No. 80-628

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

COWLES COMMUNICATIONS, INC.,
Petitioner,

VS.

JOSEPH L. ALIOTO,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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I

STATEMENT OF THE CASE

A. The Parties

Plaintiff and respondent in this action is Joseph L. Alioto. Respondent was born in San Francisco, California, in 1916. He enjoyed a brilliant academic career, and graduated from law school at the Catholic University of America in Washington, D.C. in 1940. He returned to San Francisco, and was admitted to the California bar. During the war years he worked in the Antitrust Division and for an agency called the Bureau of Economic Warfare. He entered

private practice in 1945 and in 1967 was the sole proprietor of a law firm employing 35 persons, including 17 lawyers. He was among the pioneers in the area of modern plaintiff's treble damage litigation and argued two important cases in that area in this Court, *Continental Ore v. Union Carbide,* 370 U.S. 690 (1962) and *Continental Baking Co. v. Utah Pie Co.,* 386 U.S. 685 (1967).

Respondent had always been active in local politics and accepted successive appointments to the San Francisco Board of Education and Board of Redevelopment. In 1967, respondent was co-campaign chairman of the committee to elect Eugene McAteer as Mayor of San Francisco. Several months before the election McAteer died of a heart attack while playing handball. Benjamin Swig and other prominent San Francisco Democrats persuaded respondent to run in McAteer's place, and respondent was elected Mayor of San Francisco in November of 1967. He was considering running for governor at the time the article in question appeared in September, 1969. (First trial, pp. 1702-15; second trial, pp. 227-52. Although respondent does not believe that transmission of the voluminous record is essential to an understanding of the case, Rule 19.1, and accordingly has not requested transmission of the record, record references are respectfully included herein.)

Look Magazine was only one property of petitioner Cowles Communications, Inc., an Iowa corporation owned by Gardner Cowles, formerly a defendant in this case. *Look* was already in bad financial condition in 1969, and it ceased publication in 1971 (C.T., first appeal, 1668). Apparently it was revived shortly in 1980.

B. Course Of Prior Proceedings

This diversity libel action was filed on September 5, 1969, in the Northern District of California. Petitioner's motion for summary judgment on the *Sullivan* malice issue was denied by the presiding judge, Honorable Bruce R. Thompson, on March 11, 1970 (C.T. first appeal 614-17). A 15-day jury trial ensued in April and May of 1970. The case was submitted to the jury on general verdict forms and the jury was unable to agree and a mistrial was declared. After the mistrial Judge Thompson denied petitioner's motion for judgment, which challenged the sufficiency of respondent's evidence of malice (C.T. 1388-89).

Judge Russell E. Smith was assigned to the case and petitioner renewed its motion for summary judgment on the malice issue. Judge Smith denied the motion on July 28, 1971 (C.T. 1503). The second trial began in San Francisco on September 25, 1972, and concluded by verdict on October 27, 1972. The jury at the second trial found that that article was false in one or more particulars (C.T. 1956-7). Judge Smith instructed, as Judge Thompson had at the first trial, that the competent evidence on the subject would support only a finding that the alleged Nut Tree meetings were false (See Appendix hereto, pp. A-3 and A-4). The evidence in that regard included not only the denials of respondent, but the denials of disinterested witnesses, including Jack Goldberger (Second trial, pp. 1162-3), and all of the employees of the Nut Tree Restaurant (C.T. 130-199), and a lack of corroboration from at least two law enforcement agencies, being the FBI and its California counterpart, the CII (Petition, pp. 25a-26a).

The jury also found that the article was defamatory (C.T. 1956-7). In instructing the jury on defamation, Judge Smith asked the jury to determine whether the untruths which it found in the article tended to defame respondent, and instructed them that in order to make such a determination the jury should consider the untruths or falsity in relationship to the article as a whole. The jury was instructed that statements in the article might be false without at the same time being defamatory. The Court instructed that defamatory statements are such as expose the plaintiff to disgrace or bad repute, and that if the untruths did not defame plaintiff, there should be no finding of defamation. Judge Smith's defamation instruction is included in the appendix hereto at p. A-2.

The jury at the second trial was unable to agree on the malice issue, and a second mistrial was declared. Defendant moved for judgment N.O.V. on the malice issue, and this was granted, Judge Smith concluding that he would not find malice, although conceding that another judge or a jury reasonably might do so (C.T. 2031-38). Respondent appealed to the Ninth Circuit. Petitioner did not cross-appeal or raise any point in its brief or at argument concerning the propriety or lack of it of the findings of falsity and defamation by the second jury (Petition, 3a). The Ninth Circuit remanded for trial of malice and, if malice was found, damages (Petition, 15a). This Court denied certiorari. 423 U.S. 930 (1975).

The third and fourth trials were as wide open as the first and second had been. Petitioner was completely unfettered in its proof, and called a number of witnesses who

were strictly truth-or-falsity witnesses, not malice witnesses (Fourth trial, proceedings of Mar. 29 & 30, 1977—testimony of Demers, Greenleaf, and Yore). At the third and fourth trial, the parties proceeded upon the assumption that the Nut Tree allegations were false and defamatory (Petition, 3a).

Judge Smith also presided at the third trial. The jury at the third trial hung on the malice issue 5-1 in favor of respondent. By stipulation, the fourth trial was to the Court, Honorable William W. Schwarzer (C.T. second appeal, 298). Judge Schwarzer found malice and compensatory damages, but awarded no punitive damages. Petitioner appealed to the Ninth Circuit and for the first time on appeal raised an objection to the finding of falsity by the second jury. No objection to the finding of defamation by the jury at the second trial was raised by defendant on the second appeal (Petition, 2a). On July 21, 1980, the Ninth Circuit affirmed Judge Schwarzer's judgment, and the instant petition was filed shortly thereafter.

II

SUMMARY OF ARGUMENT

A. In an affidavit filed before the first trial, petitioner for tactical reasons made what in respondent's view constitutes an admission not only of substantial falsity but of malice (C.T. 785, reproduced below at pp. 9-10). In any event, the admission, which is that petitioner never believed respondent was a member of the Mafia, committed any illegal acts, or knowingly furthered the criminal purposes of the Mafia, is an important backdrop to the other evidence in the case.

B. By the admission of the editor and authors, and as appears from a reading of the article, the Fratianno bank loans from First San Francisco Bank are the heart of the article (see below, pp. 10-11). According to the true facts as found at the fourth trial (Petition 26a), respondent had no knowledge of Fratianno's criminal record or Mafia connections at the time of the loans, respondent having met Fratianno only once and very briefly, and respondent never having heard of Fratianno prior to that single meeting (See also Appendix hereto, pp. A-6 to A-12). The First San Francisco Bank loans to Fratianno were made not by respondent but by officers of First San Francisco Bank on the business merits of Fratianno's loan application (C.T. second appeal 270, being designation of testimony of Nicholas Rizzo). Prior to and after the First San Francisco Bank loans, Fratianno obtained other legitimate loans in greater amounts from Bank of America and Bank of California (e.g., First trial, testimony of Martin, Campion, Munsill, Graham & Steinmetz, being persons associated with banks from which Fratianno obtained loans.) The article makes no mention of Fratianno's loans from Bank of America or Bank of California. The Nut Tree meetings and related allegations of the article cause the Fratianno loans from First San Francisco Bank to appear to be unjustified on the merits and the result of a willful Mafia conspiracy between respondent and Fratianno. Thus, the finding of falsity and malice on the Nut Tree meetings is a finding of substantial falsity and malice.

C. There Was No Procedural Unfairness in the Case.

1. The Nut Tree meetings were denied not only by respondent, but by Angelo Marino and Jack Goldberger, alleged participants in the meetings (Appendix p. A-3),

Goldberger being a completely disinterested witness (Petition, 30a). The FBI and California agencies had no evidence of the meetings, although they kept surveillance on some of the alleged participants (Petition, 25a-26a). All of the employees of the Nut Tree Restaurant, 70 in number, gave statements that they had no evidence of the meetings (C.T. 130-199). Petitioner offered no evidence of the truth of the meetings. Petitioner did not request an instruction that uncontradicted evidence may be disbelieved (First trial, May 12, 1970, pp. 14-29, 66, second trial, October 25, 1972, pp. 3552-55), but proceeded upon the assumption that the Nut Tree allegations were false. In these circumstances, Judge Thompson at the first trial and Judge Smith at the second trial properly instructed the jury that the competent evidence in the record would support only a finding that the statements in the article relating to the Nut Tree meetings were false.

2. In the second trial, the jury found not only falsity but defamation. Judge Smith instructed the jury that if it found the article contained false statements still the jury should not find defamation unless the false statements "taken in conjunction with the whole of the article" were defamatory of respondent (See Appendix hereto, p. A-2). Under California law a false statement in an article is actionable if the false statement "changes the complexion of the affair so as to affect the reader of the article differently than the actual truth would." *Hearne v. De Young,* 119 Cal. 670, 674 (1898); *Gantry Construction Co. v. American Pipe,* 49 C.A.3d 186, 196 (1975). The difference between the truth and the published statement must be of a

substantial character, and the published statement must produce a different effect upon the reader than would the truth of the matter.

3. Although on remand from the first appeal the trial court was to try only the issue of malice, petitioner was never precluded from making whatever proof it chose to make on any subject. The record at the fourth trial would independently have justified a finding by Judge Schwarzer that the Nut Tree and related allegations were false and defamatory (e.g., Fourth trial, 573-575 (Goldberger), 839 (respondent)). Such a finding is implicit in Judge Schwarzer's finding that the Nut Tree and related allegations were published in reckless disregard of the truth. If Judge Schwarzer believed the Nut Tree allegations were true, he would not have found malice. In finding malice and damages, Judge Schwarzer necessarily passed upon the falsity of the Nut Tree allegations and their substantiality.

4. Petitioner did not raise any objection to the instructions or findings of the second trial until after petitioner lost the malice issue at the fourth trial (Petition, 3a). If petitioner objected to the finding of falsity and defamation at the second trial, the objection should have been raised on respondent's appeal from the judgment N.O.V. in favor of petitioner after the second trial.

D. Both Judge Thompson and Judge Smith considered and denied petitioner's malice-based motions for summary judgment (C.T. 614-7; 1388-9; 1503). Although none of the juries was unanimous, the third being 5-1 in favor of respondent on malice, it is significant that none of the juries was willing to exonerate petitioner of the charge of reckless disregard or deliberate falsehood. On the first appeal the Ninth Circuit made an independent review of the evidence of malice and found the evidence to be sufficient for submission to a jury (Petition, 15a). This Court denied certiorari after the first appeal, *Alioto v. Cowles Communications, Inc.*, 423 U.S. 930 (1975). Judge Schwarzer's finding of subjective awareness of probable falsity is fully supported by the evidence and is well within the Constitutional framework of this Court's First Amendment decisions. The opinions of the Ninth Circuit in this case do not conflict with any of the four appellate opinions cited at page 20 of this petition.

III
ARGUMENT

A. Petitioner Admitted The Substantial Falsity Of The Article Prior To The First Trial

This action was filed on September 5, 1969. Early in the discovery, *Look* filed a lengthy affidavit of Martin Goldman, a *Look* editor who was in charge of the Alioto-Mafia article. The affidavit stated in part (C.T. 785):

> "E. *The Intended Meaning of the Article.*
>
> "At no time prior to publication of the article concerning Joseph L. Alioto by LOOK Magazine, did I believe nor did the authors indicate to me that they

believed, Mr. Alioto's relationship with the Mafia involved any illegal act on his part or that he was a Mafia member. LOOK Magazine did not publish, or intend to publish any such charge, as Mr. Arthur declared in his response to the September 9, 1969, television attack by Mr. Alioto on the authors, the article and LOOK. At no time prior to publication of the article, did I believe, nor did the authors indicate to me that they believed that Mr. Alioto had knowingly furthered any criminal purposes."

At the fourth trial of the action, Judge Schwarzer found that Goldman and *Look's* state of mind at the time of publication was that respondent Alioto "had never been implicated in any criminal activity or misused his office or position to shield or promote crime . . ." Petition, 30a.

Both the Goldman affidavit and Judge Schwarzer's finding at page 30a are inconsistent with the theme of the 5100 word article as that theme is expressed at page 3 of the Petition. Nowhere in the article is the substance of the Goldman affidavit conveyed to the reader. It is against the background of the Goldman affidavit that the other evidence in this case must be viewed.

B. The Difference Between The Nut Tree Allegations And The Facts As They Happened Is A Very Substantial Difference Which Is Central To The Theme Of The Article

Throughout all four trials of this case, *Look* admitted that the loans which Jimmy Fratianno obtained from the First San Francisco Bank were "the heart of the article". For example, Goldman testified in the second trial:

"I would say that the loans are the heart of the story. There is no doubt about that in my mind." (p. 1945).

At the fourth trial, he testified:

"Q. How do the bank loans figure in the theme of the article?

"A. They're the backbone of the article, the whole structure of the article is based on the bank loans and they relate to the overall theme in terms of the questions they raised about a web of alliances between a major public official and leaders of La Cosa Nostra." (p. 1077).

At the fourth trial, the District Court so found: "The heart of the article—and the subject which provided the impetus for the author's investigation—was a series of loans made by the First San Francisco Bank in 1965 to one James Fratianno." Petition, p. 21a.

Prior to publication in an interview with the authors, and throughout the four trials, Alioto maintained that he met Fratianno only once. That meeting was sometime in 1965, when Jack Goldberger, an acquaintance of Alioto's from San Francisco Democratic campaigns, brought Fratianno to Alioto's office and introduced him. Alioto had never heard of Fratianno before that day, and did not know that Fratianno had a long prison record or anything else about him. Goldberger, an officer of the Teamsters local in San Francisco, informed Alioto in Fratianno's presence that Fratianno had started a trucking company near Sacramento and would like some work from the California Rice Growers Association, an agricultural cooperative of which Alioto was president. Alioto stated that the RGA work was all contracted out. Goldberger then asked

whether Alioto might assist Fratianno in obtaining equipment loans from the First San Francisco Bank, a one-unit bank of which Alioto was chairman of the board. Alioto stated he would be pleased to do so. Goldberger and Fratianno departed. Alioto, who attended meetings of the bank's board but did not otherwise participate in its business, called the president of the bank, Nicholas Rizzo, and advised that James Fratianno would be applying for a loan. Alioto told Rizzo he did not know Fratianno "from Tom Mix" and that the loan should be made on the merits. Alioto had no further connection with the matter. Before and since that time he had directed other potential borrowers to the bank. (See Appendix D attached hereto, Appendix, pp. 5a-12a, being an excerpt from the prepublication interview between respondent and the authors.)

Fratianno had contemporaneously obtained from the Bank of America, Bank of California, and other banks, loans exceeding the amounts he sought to borrow from First San Francisco Bank, all without any involvement of Alioto, and all perfectly legitimate (e.g. Fourth trial, Plaintiff's Ex. 1, p. 1). The fact of the Fratianno loans from other banks is omitted from the article to bolster the impression that the First San Francisco Bank loans were a Mafia deal. Fratianno had won a lucrative highway construction job with the state, he showed the First San Francisco Bank a substantial net worth statement, and the loan was to be secured by trucks, and in fact most of the loan ($105,000) was paid directly to the equipment sellers (Testimony of Nicholas Rizzo, designated at C.T., second appeal, 270). For these reasons, Rizzo granted Fratianno's loan application (Testimony of Nicholas Rizzo, C.T. second

appeal, 270). A year or so later when Fratianno defaulted, the bank sold some of the equipment and took other responsible collection measures and reduced the default from $90,000 to $30,000. (Testimony of C. J. Moreno, Second trial, 813 et seq.; Petition, 29a).

At the fourth trial, on the issues of damages and malice, Judge Schwarzer found the foregoing facts to be true. Petition, pp. 26a, 29a.

The Nut Tree allegations present a second version of the Fratianno bank loans. According to this version, Alioto attended a series of nighttime meetings with Fratianno and a number of other hoodlums (LaPorte, Bompensiero, Angelo Marino), all of whom he knew to be associated with the Mafia or organized crime (Petition, Appendix D). With excitement, Alioto told them of his interest in the bank, assured them they would have access to the bank's money for whatever purposes they wanted, and promised Fratianno that Fratianno would be able to obtain loans from the bank, but told him that because of his hoodlum reputation, Alioto would be unable to obtain bank stock for Fratianno. Alioto and his Mafia friends also discussed how they would control the bank, according to the *Look* article. Also, according to the article, when Fratianno defaulted on the loans, the First San Francisco Bank did nothing to collect.

It is submitted that under the true facts as they happened, no Alioto-Mafia tie is to be inferred from the Fratianno bank loans. On the other hand, that tie would be fully substantiated if the Nut Tree allegations were true. This difference meets the substantiality test of libel in California under *Hearne v. De Young* and the other Cali-

fornia libel cases cited below at page 17. To use the words of *Hearne,* does the inaccuracy change the complexion of the affair so as to affect the reader of the article differently than the actual truth would? Is the difference [between the truth and the untrue statement] of a substantial character, and does it produce a different effect? Manifestly, the answer to both questions is yes. This is the applicable rule; the rule is not whether more than half of the 5100 words or 71 paragraphs are false.

There was therefore an ample basis upon which the jury in the second trial, Judge Schwarzer in the fourth trial, and the Ninth Circuit in the second appeal each found upon an independent review of the record that the gist or sting of the article lay in the Nut Tree allegations. *Look's* contention that it has never had a trial of the substantial truth of the article as a whole is incorrect. That issue was tried by the second jury when it found defamation as to the Nut Tree allegations, by Judge Schwarzer, and by the Ninth Circuit on the second appeal.

If the Nut Tree allegations are removed, there is no defamatory link between respondent and Fratianno, and no link at all between respondent and Bompensiero or respondent and La Porte, who were connected to respondent only by attendance at the Nut Tree meetings. That leaves only Emilio Giorgetti, the Marinos, and James Lanza. Respondent did corporate and tax work for Giorgetti until he died in 1960 (Fourth trial, pl's exhibit 5, pp. 34-44). In the 1960's, respondent's law office did some work for the Marinos (Exhibit 5, pp. 13-18). Giorgetti and the Marinos were not acquainted with each other. Respondent

first met Lanza when respondent was about 10 years old. Respondent worked during the summers at respondent's father's wholesale fish business on Washington and Montgomery Streets in San Francisco, and Lanza, about 15 years older than respondent, worked two doors down in an insurance and real estate brokerage business. Respondent was never Lanza's lawyer, although Ned Burns, a lawyer who shared office space with respondent, did represent Lanza in connection with a grand jury hearing into the 1958 Appalachin meeting. Although respondent has known Lanza his whole life, there has never been any sort of continuing relationship, business, social, or professional, between respondent and Mr. Lanza (e.g., First trial, 1729-1730).

C. There Was No Procedural Unfairness At Any Stage Of The Long Proceedings

1. Judge Thompson And Judge Smith In The First And Second Trials Properly Instructed That The Nut Tree Allegations Were False

As to the finding of falsity of the Nut Tree allegations, Judge Thompson in the first trial had instructed the jury that much hearsay and incompetent evidence was admitted to show petitioner's state of mind, but that only legal evidence would suffice on issues of truth or falsity. Judge Thompson's instruction in this connection, as well as the full context of Judge Smith's instruction on the same subject are included in the appendix at pp. A-3 and A-4.

Three of the alleged participants in the Nut Tree meetings, respondent, Angelo Marino, and Jack Goldberger, all denied that the alleged meetings took place (See Judge Thompson's instruction, Appendix p. A-3). At the

fourth trial, Judge Schwarzer noted that Goldberger was a disinterested witness (Petition, p. 30a). There is no evidence anywhere in the record that the Nut Tree meetings took place. In November of 1969, seventy persons employed by the Nut Tree Restaurant, being all the persons approached on the subject, gave statements that they had no evidence of the alleged meeting (C.T. 130-199). Also, in separate pre-publication interviews with the authors, Alioto and Goldberger denied facts necessary to the truth of the Nut Tree allegations (Petition, pp. 26a-27a). The FBI and CII had no information concerning the alleged meetings (Petition 25a-26a).

The petition quotes only half of the pertinent rule, which in its entirety is:

> "A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony." 88 C.J.S. Trial, ¶ 257(g), cited in *Powers v. Continental Casualty Co.*, 301 F.2d 386 (8th Cir. 1962).

Added to this is the concept that having published the allegations to millions of people, the publisher should bear some responsibility for their proof, at least after the plaintiff has offered competent disinterested evidence of their falsity. In addition, at neither the first nor the second trial did *Look* request an instruction similar in substance to Devitt & Blackmar's ¶¶ 17.21 or 73.12, which instructs that the jury is not bound to accept uncontradicted evidence.

In *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967), a First Amendment case, failure to object to erroneous jury instructions on malice precluded review by this Court of the instructions.

2. The Defamation Instruction At The Second Trial Satisfies California's Substantial Falsity Requirement

Petitioner cites only half of the California rule on substantial truth or falsity in libel actions. In its entirety the rule is stated as follows:

> "The textwriters substantially agree as to the rule, and it is well stated by Sutherland on Damages, volume 3, page 2626: 'A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter, if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would.' It is not the mere fact that a difference exists between the published report of the proceeding and the proceeding as it actually occurred, that determines the presence of the libel, but rather, is the difference of a substantial character, and does it produce a different effect?" *Hearne v. De Young,* 119 Cal. 670 at p. 674 (1898); *see also Kurata v. Los Angeles News Pub. Co.,* 4 Cal. App. 2d 224 at pp. 227-228 (1935); *Handelsman v. San Francisco Chronicle,* 11 C.A.3rd 381 at pp. 386-387 (1970); *Gantry Construction Co. v. American Pipe,* 49 C.A.3rd 186 at p. 196 (1975).

Judge Smith's defamation instruction at the second trial is set forth in the appendix hereto at p. A-2. That instruction correctly states the California law. The jury was to consider the issue of defamation only with respect to the parts of the article which the jury found to be false (" . . . would the untruths tend to defame Plaintiff to the average reader? In this connection, you must consider each portion of the article you find to be false in relationship to the whole article, including those portions found to be false or found or admitted to be true.")

The jury was instructed that it could not base its finding of defamation upon false statements in the article unless those false statements were injurious to plaintiff's reputation, viewing the article as a whole. Petitioner suggests at note 12 that it makes no difference whether respondent met with Fratianno at the Nut Tree or at respondent's office. If the meeting among Goldberger, Fratianno, and respondent at respondent's office in fact had the same strong overtones of conscious wrongdoing and willful breach of respondent's duties to the shareholders and depositors of the First San Francisco Bank as the Nut Tree meetings do, then petitioner's suggestion would be valid. But, in terms of defamatory content, there is a vast difference between the Nut Tree meetings of the article and the single meeting in fact of respondent with Fratianno and Goldberger. If the jury at the second trial thought the office meeting to be interchangeable with or not much different from the Nut Tree meetings, the jury was free, relying on Judge Smith's defamation instruction, to find the Nut Tree meetings false but answer the defamation interrogatory negatively. There was abundant sub-

stantial evidence in the record upon which the jury could and did find that there was a difference in kind between the Nut Tree meetings and the admitted meeting in respondent's office, as respects a tie between respondent and the Mafia. If petitioner seasonably had objected on appeal to the findings of falsity and defamation at the second trial, the objection would properly have been rejected on the merits.

3. The Ninth Circuit's Waiver Holding Is Clearly Correct

If *Look* disagreed with the finding of falsity of the Nut Tree meetings and their defamatory character, both made at the second trial, it should have raised its objection on respondent's appeal from the judgment in favor of *Look*. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253-54; *Zimmerman v. Matthews Trucking Corp.*, 205 F.2d 837, 839 (8th Cir. 1953); *Oberman v. Dunn & Bradstreet, Inc.*, 507 F.2d 349, 353 (7th Cir. 1974). The finding of falsity and defamation but no malice in this case was quite similar to the finding of the patent's validity but no infringement in *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). The successful defendant in that case obtained reformation of the decree to eliminate the finding of validity of the patent on defendant's own appeal. Certainly, *Look* in this case could have obtained review, by formal cross-appeal or even by argument in the brief, of the allegedly erroneous findings of the second trial. *Montgomery Ward v. Duncan, supra.* Having failed to do so, indeed, having proceeded through the third and fourth trial without objection to the second trial's findings of

falsity and defamation, *Look* was clearly precluded from raising an objection to those findings on the second appeal. *Richardson v. Communication Workers of America, AFL-CIO,* 486 F.2d 801, 803-05; *Haynes v. United States,* 418 F.2d 1380, 1382 (Ct. Cl. 1969); *Calhoun v. Bernard,* 359 F.2d 400, 401 (9th Cir. 1966). If *Look* could have cross-appealed or raised its objections on the first appeal, which clearly it could have, *Look's* attempt to distinguish the foregoing cases as involving successive appeals by the same party must fail. Also, in support of the proposition at page 14 of the Petition, that "an appeal from a final judgment draws into question all rulings producing the judgment," *Look* cites *Herron v. Rozelle,* 480 F.2d 282, 285 (10th Cir. 1973) and *Baldwin v. Redwood City,* 540 F.2d 1360, 1364 (9th Cir. 1976), both of which involved only a single appeal.

4. Petitioner Was Not Precluded From Proof Of Any Fact At Any Stage Of The Proceedings. The Fourth Trial Provides An Independent Basis For The Judgment

On the first appeal the Ninth Circuit remanded for a trial of malice only (Petition, 15a). Petitioner suggests that at the third and fourth trials petitioner was saddled with an erroneous finding of falsity and defamation as to the Nut Tree meetings. No rule or order however prevented petitioner from proving the truth of the Nut Tree meetings at the third or fourth trial or at any other stage of the case. At the third and fourth trials, petitioner produced Frank Greenleaf, who testified to a second meeting between respondent and James Fratianno. Greenleaf

was not known to petitioner until after publication of the article. Therefore, his testimony was relevant only to truth or falsity issues, not malice issues. Other "truth" witnesses produced by petitioner at the fourth trial were Yore and Demers of First San Francisco Bank. Also, the same evidence which conclusively showed the falsity of the Nut Tree allegations at the first trial was offered by respondent and received at the third and fourth trials (Fourth trial, Goldberger pp. 573-5; Alioto p. 839). The Ninth Circuit's limitation of further retrial to malice had no effect upon the proof presented by the parties at the third and fourth trials.

Although Judge Schwarzer was not free to retry the matter of falsity of the Nut Tree allegations, or defamation as to those allegations, he was not bound with respect to the issues of malice and damages. If, after hearing the evidence, Judge Schwarzer believed the Nut Tree allegations were true or if he thought that they were a harmless inaccuracy which did not affect the substance or gist of the Alioto-Mafia charge, he certainly would have found for petitioner on malice or damages or both. A finding of falsity is implicit in a finding of reckless disregard of the truth. A finding of substantiality of the falsity, or defamation, is implicit in the finding of damages as they are defined in California. (Civil Code § 48a: "General damages are damages for *loss of reputation,* shame, mortification, and hurt feelings.") Given petitioner's admission that the heart of the article is the Fratianno bank loans, there was substantial evidence to support Judge Schwarzer's finding and the Ninth Circuit's finding on the second appeal that the gist or sting of the article lay in the Nut Tree meetings. Judge Schwarzer

correctly concluded that with the Nut Tree related Fratianno bank loans to one side, there remains nothing except attorney-client relationships upon which to base the Mafia charge against respondent. There were honorable relationships, evidenced by proceedings in open court.

In short, if there was error at the second trial, it did not infect the judgment produced at the fourth trial, which judgment rests on its own independent support.

D. The Sufficiency Of The Evidence Of Malice Has Been Repeatedly Reviewed In The Lower Courts

1. Judge Schwarzer Used The Correct Constitutional Standard In Finding Malice

Early in the case, Judge Thompson denied petitioner's motion for summary judgment on the malice issue. Prior to the second trial, Judge Smith did the same. In entering judgment for petitioner after the second trial, Judge Smith did not hold that the evidence of malice by clear and convincing evidence was insufficient, but only that as the trier of fact, he would not have found malice. In reversing, the Ninth Circuit independently reviewed the evidence of reckless disregard and found it sufficient for submission to a jury. It is significant that none of three juries was willing to exonerate petitioner of the charge of reckless disregard or intentional falsity.

The evidence that petitioner published the Nut Tree allegations with knowledge of falsity or reckless disregard is clearly set forth in Judge Schwarzer's opinion and cannot be recounted here. Judge Schwarzer applied the correct rule—subjective awareness of probable falsity—in

finding malice. He listened to the authors and the Look editor testify to their good faith, and did not believe them, based on the objective facts and circumstances surrounding the publication of the article, particularly the Fratianno bank loans. Petition, 27a-31a. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 1639 (1979); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 1326 (1968).

2. There Is No Conflict Among The Circuits

The rules of law appearing in the appellate opinions in this case do not conflict with those of any other circuit or with the cases cited at page 20 of the Petition. *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978); *Hotchner v. Castillo Puche*, 551 F.2d 910 (2nd Cir. 1975), *cert. denied* 434 U.S. 834 (1977); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Waskow v. Associated Press*, 462 F.2d 1173 (D.C. 1972). Those cases resulted in judgment for the publisher by reason of failure of proof, not because the rules of law were different from those applied in the case at bar.

IV

CONCLUSION

There is no merit in petitioner's contention that there was error in the falsity of defamation findings of the second trial. Both findings were fully supported by the record. When on the first appeal petitioner failed to cross-appeal or raise its objections to the findings at the second trial, it thereby precluded itself from raising those objections upon a subsequent appeal. Even if there was error at the second trial, that error did not taint the judgment

which resulted from the fourth trial. In a real and practical sense that judgment stands completely on its own footing. The District Court found all the facts necessary to a valid judgment after the Ninth Circuit had independently reviewed them.

This case has been correctly decided and should at long last be put to rest. The petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 8, 1980

(Appendices Follow)

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APPENDIX A

Proceedings of October 25, 1972

Judge Smith's Instruction on Defamation

"If you reach question #2, you will, of course, have determined that a part or parts of the article were false. Then you must decide whether the article is defamatory. Obviously we may say many false things about a person without defaming him. Thus, the article in question states that plaintiff is bald. Had it said that he had a heavy head of hair, that would be a false statement but not a defamatory one. A statement, writing, picture, diagram and so on is defamatory if it exposes any person to hatred, contempt, ridicule or obloquy (meaning disgrace or bad repute) or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation; the defamation must appear on the face of the article, that is, without the aid of any facts which do not appear in the article. In determining whether the article is defamatory you must determine the probable effect of the article upon the mind of the average reader. In other words, would the untruths tend to defame Plaintiff to the average reader? In this connection, you must consider each portion of the article you find to be false in relationship to the whole article, including those portions found to be false or found or admitted to be true. Any falsehood taken in conjunction with the whole of the article as viewed by the average reader is defamatory, then that is sufficient. The article must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader and construed in the light of the whole scope an apparent object of the Defendant, considering not only the actual language used but the implications of it—the sense and meaning which may have been fairly presumed to have been conveyed to those who read it."

APPENDIX B

Proceedings of May 12, 1970

Judge Thompson's Instruction On Falsity Of Nut Tree

"Normally, hearsay evidence will not be considered as legal evidence to prove a fact in court. For example, unauthenticated documents and statements made by a person out of court, not under oath and not subject to cross-examination. For this reason, the evidence which has been received here for the limited purpose as stated above cannot be given any weight or effect on the issue of the falsity of the disputed facts stated in the article.

"An example of this is the alleged Nut Tree meetings referred to in the article. There is no evidence in the case from which you properly could find that such meetings took place. The authors' notebooks, the transcripts of Carlson's conversations with Tommy Lee Thomas, and even the deposition testimony of Tommy Lee Thomas, are all hearsay and incompetent to prove that the meetings occurred. The only evidence in the case on the issue, that is, the testimony of the plaintiff and of Jack Goldberger and of Angelo Marino, denies that the meetings occurred, and there is no legal and competent evidence to the contrary.

"So, when you are considering the issue of whether the published article is false and you come to the disputed statements in the article regarding the Nut Tree meetings, it should be clear to you that the competent evidence in the case on the issue will support only a finding that the statements are false. This is stated as an example, and you will find other situations of the same kind in the course of your deliberations." Transcript of May 12, 1970, pp. 56-57.

APPENDIX C

Proceedings of October 25, 1972

Judge Smith's Instruction on Falsity of Nut Tree

"Now, during the course of this trial there were several occasions when I advised you that evidence was being received for the limited purpose of showing state of mind. Now, to elucidate this proposition more fully, let me now say this. If the state of mind were not important as it bears on the issue of actual malice, much of the evidence which is now before you would not have been received. An example of this is the authors' notebooks. They are not proof of the facts stated in them. They are to be considered by you only in connection with the Defendant's state of mind.

"For this reason the evidence which has been received for a limited purpose cannot be given any weight or effect on the issue of the falsity of the disputed facts stated in the article.

"An example of this is the alleged Nut Tree meetings referred to in the article. There is no evidence in this case from which you properly could find such meetings took place. The authors' notebooks, the transcripts of Carlson's conversations with Tommy Lee Thomas, and even the deposition testimony of Thomas are all hearsay and incompetent to prove that the meetings occurred. The only legal evidence in the case on the issue denies that the meetings occurred and there is no legal and competent evidence to the contrary. So, when you are considering the issue of whether the published article is false—and that, of course, is the issue outlined to you in question #1 here—and you come to the disputed statements in the article regarding the Nut Tree meetings, it

should be clear to you that the only competent evidence in this case on the issue will support only a finding that the statements are false. That these statements are false does not indicate to you that there is no evidence, which, if believed by you, would support the truth of other contested fact issues."

APPENDIX D

Excerpts from August 12, 1969 pre-publication interview between respondent and authors Carlson and Brisson. (The full transcription of the interview was received in evidence at the fourth trial as Plaintiff's Exhibit 5. The transcription from the tape recording of the interview, which tape recording was consented to by respondent, was made by petitioner. The recording was played for the Look editors shortly after August 12, 1969 and prior to publication (e.g., Third trial, proceedings of October 29, 1976, pp. 702-709; fourth trial, p. 410). At the August 12, 1969 interview the authors did not directly confront respondent with the Nut Tree allegations (e.g., third trial, 706, 709), although those allegations by that time had been incorporated into the draft of the article (Petition, p. 10a)).

The questions were asked by the authors, Carlson or Brisson:

"....: Frank Bompensiero.

"MAYOR ALIOTO: Who?

"....: Frank Bompensiero.

"MAYOR ALIOTO: Frank Bompensiero. Never heard of him. Never heard of him. Never heard of him. Never heard the name.

"....: Frank La Porte?

"MAYOR ALIOTO: Frank Who?

"....: Frank La Porte.

"MAYOR ALIOTO: La Porte? Never heard of the man.

"....: Carlos Marcello.

"MAYOR ALIOTO: Who?

"....: Carlos Marcello.

"MAYOR ALIOTO: Never heard of the man.

".....: Jimmy Fratianno?

"MAYOR ALIOTO: Yes, I have heard of Jimmy Fratianno.

".....: I gather your reaction—

"MAYOR ALIOTO: Oh, lord. Well, I had this from Ed Montgomery. You know, it is getting more ridiculous. You know, the thing about it, you know, I'm not blaming you for this but Charles Raudebaugh and a few of the other guys have investigated and then dismissed it—go around talking all around town, you know, about Fratianno's tied up with the Mayor, and all this kind of stuff.

"I was sitting in my rice office one day when I was Chairman of the Board of the First San Francisco Bank, doing damned little banking, and Jack Goldberger, whom you know, the Teamsters Union, comes in the office with a guy named Fratianno. I had never seen the guy before in my life, and I don't believe I have seen him since, unless he came back from the Bank afterwards with Jack. But in any event, the picture I have is Goldberger bringing this fellow in.

"And he said this fellow's going to go into the trucking business. You know, the Teamsters have a little jurisdictional dispute as between one local and another union. And Goldberger was interested in putting this guy in business in Sacramento—he said he was going in business in Sacrament on a bulk grain thing. And could he have the Rice Growers' business? And I said, hell, no. We've been dealing with somebody in the Rice Growers' business for 25 years and he can't have the Rice Growers' business.

"I haven't seen this guy before, didn't know anything about him. And Ed Montgomery told me recently he had a record, which is the first knowledge I have had this guy had a record. I said no, you couldn't have the Rice Growers' business. So then he said, Well, now, he is going up there in the bulk grain business and we think it's going to be a successful thing. He is going to build a big fleet. Jack Goldberger talking all this time. He was saying a few words. Would you help him with a loan over at the First San Francisco Bank? I said, Jack, if you can vouch for the fellow, why I'll call Nick Rizzo right now, and I went through this act 101 times with friends of mine. I mean, if Bill had walked in at that time I would have done it, too. And I called over and say, Nick—Nick Rizzo—Nick, Jack Goldberger has a friend whom he wants to have financed on something. They'll come over and see you right now. They walk out of my office to go over to the Bank, which is three blocks down the way, and as I have done a thousand and one times, I pick up the telephone again and I said, Nick, I don't know these people from Tom Mix. You have to make the loan strictly on the merits. And I was always careful that nobody could ever say that the Bank made a loan at my importuning that went bad. Always very sensitive about that situation.

"As I say, I've had friends of mine come in from school whom I hadn't seen, you know, since grammar school days. Joe, I have this little business I would like you to help me finance. I couldn't get financing. I go through the same act. So I will be glad to tell Mr. Rizzo you're coming over. And then call up Nick and say, Look, Nick, I haven't seen this guy in 30 years. I don't know anything about him. Your

merits and responsibility. I did the same damn thing with Fratianno. Fratianno got a loan based on collateral. And at that time this little Bank was looking for loans. If you take the period of time involved, this is the time when we were taking six percent loans when we could have five percent loans from the Bank of America. The Directors themselves, to help the Bank along. And they gave him a collateralized loan. Collateralized loan. This is what the Chronicle finally told me, it was a collateralized loan. I didn't even know. I knew that he had some kind of a loan. And that's the beginning and the end of my relationship with a man named Jim Fratianno. And the only time I heard there was anything wrong with the guy was when Ed Montgomery told me in this office three weeks ago. It's all over town, you know.

".....: It was a bad loan?

"MAYOR ALIOTO: It's all—huh?

".....: It was a bad—

"MAYOR ALIOTO: That's what I found out. But I don't know how in the hell a collateralized loan can be a bad loan. They had the—they had the last—Ed Montgomery told me.

".....: Why didn't they repossess all the guy's trucks?

"MAYOR ALIOTO: I don't know anything about that. I don't know anything about the guy. But I want you to point out that even at this stage of the game Nick and I were fighting about the Bank policy. I was going for mergers and Nick was going for this very conservative little Bank here in San Francisco. But you know, you get—you

associate me with Fratianno on this kind of a record—and it's all over town now that I have been dealing with a guy named Fratianno, is a little bit—it's a little bit, not really fair. Go ahead.

".....: Mr. Mayor, that was the first—that was the day before, the same day he got the loan, he put in the application. Was that—

"MAYOR ALIOTO: Oh, I don't know when—the minute I sent him over to Nick—

".....: Oh, you sent him over to the Bank?

"MAYOR ALIOTO: The minute I sent him over to the Bank, and then called Nick and said, I don't know these people from Tom Mix. And I know Jack Goldberger, obviously. Jack and I had been in campaigns together since the New Deal. I just knew Jack politically. And not too well at that—I wasn't that active. Once I performed this little ceremony, which I had a thousand and one times even with some very good friends, you know, some very good friends of mine went down, and I know he is a good character, and he wanted a loan, but he had not been successful particularly, I called Nick and said, Look, Nick, I'm sending this guy over and I want you to know right now you are vouching for the loan. Never me. And I have a record where nobody can call up—nobody in that Bank could ever call up and say, Look, Alioto, you sent a bad loan over to us, whether be a good man, bad man, friend, foe, or otherwise. I'm going to keep that record, too.

"But the—once I sent him over, I don't know what the course of things was from there on. I haven't the slightest idea.

".....: You are talking of that loan?

"MAYOR ALIOTO: I don't know the course of things was. I have given you the whole story—

".....: Did Angelo Marino accompany Mr. Goldberger to your office that day?

"MAYOR ALIOTO: No, I don't recall that he did. I don't recall that he did.

".....: He might have, though?

"MAYOR ALIOTO: No, I don't recall that he did. I have—this was in the rice office on the 19th floor at 111 Sutter—or the 20th floor of 111 Sutter Building, and I have a recollection that Goldberger and this fellow telling me about this new method of handling bulk grain, you know, we had been doing that for years and they thought they had something new. And this—

".....: Was Goldberger a friend of Marino's?

"MAYOR ALIOTO: I haven't the slightest idea.

".....: You don't know whether Marino was present or not?

"MAYOR ALIOTO: I don't remember him being present. I have no recollection of his being present with Fratianno. It was Goldberger who came in and Goldberger who vouched for him and Goldberger who took him to the Bank.

".....: Was Marino banking with that Bank, by the way, at that time?

"MAYOR ALIOTO: No. He never banked—he banked at Bank of America, I think. We had no branch in San Jose, you know. We just had the San Francisco branch.

".....: We are talking about Bank of America on Columbus, aren't we?

"MAYOR ALIOTO: No, no, that was Bank of America in San Jose. The cheese plant is located in San Jose, you understand. But I don't—Now I don't know whether Marino banked—I think think he was. I never heard that he was. Never heard that he was. And that's a simple matter of taking the Bank record, I think. But I don't recall of any dealings at the time of his SB—the small business loan—that there was any participation by anybody but the Bank of America. And I assume therefore he had to be banking with them since they were involved.

".....: Did you at any other time meet with Jimmy Fratianno or Marino or anybody else?

"MAYOR ALIOTO: Never, never. The only time I remember seeing Fratianno was on this occasion. That's the only time."